106

No. 07-1468

FILED
SEP 26 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

JANET C. MANNING, PETITIONER

v.

MICHAEL J. ASTRUE, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
GREGORY G. KATSAS
Assistant Attorney General
WILLIAM KANTER
MICHAEL E. ROBINSON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether an "award of fees and other expenses" under the Equal Access to Justice Act, 28 U.S.C. 2412(d), is properly paid to the "prevailing party" and is subject to offset, pursuant to 31 U.S.C. 3716 (2000 & Supp. V 2005) and implementing regulations, for debt owed by the prevailing party to the United States.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 15

TABLE OF AUTHORITIES

Cases:

Commissioner, INS v. *Jean*, 496 U.S. 154 (1990) 5, 11
Cornella v. *Schweiker*, 728 F.2d 978 (8th Cir. 1984) 13
Dennis v. *Chang*, 611 F.2d 1302 (9th Cir. 1980) 12
Drennan v. *General Motors Corp.*, 977 F.2d 246 (6th Cir. 1992), cert. denied, 508 U.S. 940 (1993) 8
Evans v. *Jeff D.*, 475 U.S. 717 (1986) 5, 10, 11, 12
FDL Techs., Inc. v. *United States*, 967 F.2d 1578 (Fed. Cir. 1992) 7
Gilbrook v. *City of Westminster*, 177 F.3d 839 (9th Cir.), cert. denied, 528 U.S. 1061 (1999) 12
Gisbrecht v. *Barnhart*, 535 U.S. 789 (2002) 3, 9
Hairston v. *R&R Apartments*, 510 F.2d 1090 (7th Cir. 1975) 12
King v. *Commissioner of Soc. Sec.*, 230 Fed. Appx. 476 (6th Cir. 2007) 7
Marré v. *United States*, 117 F.3d 297 (5th Cir. 1997) 14
Oguachuba v. *INS*, 706 F.2d 93 (2d Cir. 1983) 9
Panola Land Buying Ass'n v. *Clark*, 844 F.2d 1506 (11th Cir. 1988) 8, 9, 11

Cases—Continued: Page

Plant v. *Blazer Fin. Servs., Inc.*, 598 F.2d 1357 (5th Cir. 1979) 12
Ratliff v. *Astrue*, No. 07-2317, 2008 WL 4093013 (8th Cir. Sept. 5, 2008) 7, 13
Reeves v. *Astrue*, 526 F.3d 732 (11th Cir. 2008), petition for cert. pending, No. 08-5605 (filed Aug. 1, 2008) 7
Richardson v. *Penfold*, 900 F.2d 116 (7th Cir. 1990) 13
Richlin Sec. Serv. Co. v. *Chertoff*, 128 S. Ct. 2007 (2008) 7
Rodriguez v. *Taylor*, 569 F.2d 1231 (3d Cir. 1977), cert. denied, 436 U.S. 913 (1978) 12
Turner v. *Secretary of the Air Force*, 944 F.2d 804 (11th Cir. 1991) 12
United States v. *Gonzales*, 520 U.S. 1 (1997) 11
United States ex rel. Virani v. *Jerry M. Lewis Truck Parts & Equip., Inc.*, 89 F.3d 574 (9th Cir. 1996), cert. denied, 519 U.S. 1109 (1997) 12
Venegas v. *Mitchell*, 495 U.S. 82 (1990) 5, 10
Williamson v. *Aetna Life, Ins. Co.*, 481 F.3d 369 (6th Cir.), cert. denied, 128 S. Ct. 671 (2007) 8
Willis v. *GAO*, 448 F.3d 1341 (Fed. Cir. 2006), cert. denied, 127 S. Ct. 1356 (2007) 12

Statutes, regulations and rule:

Act of Aug. 5, 1985, Pub. L. No. 99-80, § 3, 99 Stat. 186 ... 3
Equal Access to Justice Act, 28 U.S.C. 2412 1
28 U.S.C. 2412(d) 7
28 U.S.C. 2412(d)(1)(A) 2, 4, 7

Statutes, regulations and rule—Continued: Page

28 U.S.C. 2412(d)(1)(B) 2, 8, 14
28 U.S.C. 2412(d)(2)(A) 8
28 U.S.C. 2412(d)(2)(B) 2, 8, 14
26 U.S.C. 7430 ..... 13, 14
26 U.S.C. 7430(a) 14
26 U.S.C. 7430(c)(4) 14
31 U.S.C. 3716 (2000 & Supp. V 2005) 3, 6
42 U.S.C. 406(a)(5) 9
42 U.S.C. 406(b) 2, 9
42 U.S.C. 406(b)(1) 4, 5
42 U.S.C. 406(b)(1)(A) 3, 9
42 U.S.C. 406(b)(2) 9
42 U.S.C. 1988 ..... 5, 9, 11, 12
42 U.S.C. 1988(b) 10
31 C.F.R.:
Sections 285.1-285.8 3
Section 285.5(e)(1) 10
Section 285.5(e)(2) 10
Fed. R. Civ. P. 60 4

Miscellaneous:

H.R. Rep. No. 1418, 96th Cong., 2d Sess. (1980) 2, 5, 11

In the Supreme Court of the United States

No. 07-1468

JANET C. MANNING, PETITIONER

v.

MICHAEL J. ASTRUE, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-27a) is reported at 510 F.3d 1246. The opinion of the district court (Pet. App. 28a-34a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 2007. A petition for rehearing was denied on February 22, 2008 (Pet. App. 35a-36a). The petition for a writ of certiorari was filed on May 22, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress enacted the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412, to enable "certain prevail-

ing parties to recover an award of attorney fees, expert witness fees and other expenses against the United States" in appropriate cases. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 6 (1980). EAJA thus authorizes courts to "award to a prevailing party other than the United States fees and other expenses * * * incurred by that party" in a civil action if the position of the United States is not substantially justified and no special circumstances would make an award unjust. 28 U.S.C. 2412(d)(1)(A).

Before a court may "award [fees and other expenses] to a prevailing party," 28 U.S.C. 2412(d)(1)(A), the "party seeking [such] an award" must submit an application that, *inter alia*, "shows that the party is a prevailing party and is eligible to receive an award under [EAJA]." 28 U.S.C. 2412(d)(1)(B). The applicant for a fee award must therefore demonstrate that it falls within EAJA's definition of "party"—*i.e.*, that it is an individual or small business whose net worth when the action was filed did not exceed $2 or $7 million, respectively, or a non-profit organization meeting specific criteria. 28 U.S.C. 2412(d)(2)(B). The applicant must also document "the amount sought" by providing in its application "an itemized statement from any attorney or expert witness representing or appearing in behalf of the party." 28 U.S.C. 2412(d)(1)(B).

In civil actions for judicial review of Social Security benefit determinations, Congress has separately authorized awards of reasonable attorney fees in 42 U.S.C. 406(b). When a successful Social Security claimant "who was represented before the court by an attorney" obtains a favorable judgment, "the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the

total of the past-due benefits to which the claimant is entitled by reason of such judgment." 42 U.S.C. 406(b)(1)(A). If an attorney's fee is awarded under this provision, the Commissioner of Social Security (Commissioner) may certify the amount of such fee "for payment to such attorney out of * * * the amount of" the past-due benefits owed to the claimant. *Ibid.* In cases in which awards are made under both EAJA and Section 406(b), "the claimant's attorney must 'refun[d] to the claimant the amount of the smaller fee.'" *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 796 (2002) (quoting Act of Aug. 5, 1985, Pub. L. No. 99-80, § 3, 99 Stat. 186).

b. The Department of Treasury, through the Financial Management Service, operates a centralized delinquent debt collection program known as the Treasury Offset Program. That program matches the name and taxpayer identifying number on certain federal payments with the name and taxpayer identifying number on delinquent debts that federal and state agencies have certified to Treasury as valid, delinquent, and legally enforceable. See generally 31 U.S.C. 3716 (2000 & Supp. V 2005); 31 C.F.R. 285.1-285.8. In January 2005, the Financial Management Service implemented offset of so-called "miscellaneous" payments, which include payments for EAJA awards.

2. Petitioner brought suit in district court to challenge the Commissioner's denial of supplemental security income (SSI) benefits to petitioner. The district court reversed the denial and remanded the case for further proceedings. Pet. App. 6a.

Petitioner then moved for an award of fees and other expenses under EAJA. Pet. App. 6a, 28a. Without objection from the Commissioner, the district court awarded $5958 under EAJA to petitioner as the prevail-

ing party. *Id.* at 6a. It further ordered that, if petitioner's attorney were awarded fees pursuant to 42 U.S.C. 406(b)(1), the attorney must refund the smaller of the two amounts to petitioner. Pet. App. 6a.

Petitioner's counsel subsequently received a check made payable to petitioner in the amount of $3992 with notice that $1966 had been deducted as an offset for a student-loan debt owed by petitioner to the Department of Education. Pet. App. 6a-7a. Petitioner's counsel, on his own behalf, filed a motion pursuant to Rule 60 of the Federal Rules of Civil Procedure seeking either to set aside the administrative offset or to correct what counsel perceived to be a clerical error by the district court in awarding attorney's fees to petitioner rather than to her attorney. *Id.* at 7a. The district court denied the motion, holding that no clerical error had been made and that the EAJA payment was properly made directly to petitioner based on the "clear language" of 28 U.S.C. 2412(d)(1)(A). Pet. App. 28a-33a.

3. The court of appeals affirmed. Pet. App. 4a-27a.

a. The court of appeals held that the EAJA award was properly paid to petitioner rather than to her attorney. Pet. App. 10a-24a. The court explained that EAJA's "statutory language alone makes it clear that the prevailing party and not the attorney may recover an award of attorney's fees." *Id.* at 15a. In specifying that a court "shall award to a prevailing party * * * fees and other expenses * * * incurred by that party in [the] civil action," 28 U.S.C. 2412(d)(1)(A), the court of appeals observed, EAJA's "statutory language clearly provides that the prevailing party, who incurred the attorney's fees, and not that party's attorney, is eligible for an award." Pet. App. 11a-12a. That construction of the statute, the court of appeals concluded, was rein-

forced by other EAJA provisions that distinguish between a prevailing party and the litigant's attorney by requiring the party to submit an itemized statement from its attorney, "treat[ing] attorneys in the same manner as" expert witnesses and other persons found to be "needed to prepare the case," and conditioning eligibility for an award on the net worth of the "prevailing party, not the attorney." *Id.* at 14a; cf. *id.* at 17a (noting "settled law that the attorney does not have standing to apply for the EAJA fees" because "that right belongs to the prevailing party").

The court of appeals further found EAJA's legislative history to be consistent with the statute's unambiguous text because that history "clearly states that the fees are for the claimant." Pet. App. 15a (citing H.R. Rep. No. 1418, *supra*, at 5-6). The court explained that Congress intended EAJA "to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions." *Id.* at 16a (quoting *Commissioner, INS* v. *Jean*, 496 U.S. 154, 163 (1990)). The court therefore rejected the notion that the statute was "enacted for the benefit of counsel to ensure that counsel gets paid." *Ibid.*

The court of appeals found additional support for its holding in related statutory contexts. Noting that legal principles developed in "cases addressing other fee-shifting statutes, such as [42 U.S.C.] § 1988," apply in the EAJA context, Pet. App. 13a n.5, the court found it significant that this Court has "rejected the argument that the entitlement to a § 1988 award belongs to the attorney rather than the plaintiff." *Id.* at 12a-13a (quoting *Venegas* v. *Mitchell*, 495 U.S. 82, 89 (1990), and citing *Evans* v. *Jeff D.*, 475 U.S. 717 (1986)). Similarly, it found that Section 406(b)(1), unlike EAJA, "expressly

provides for payment to the attorney," demonstrating that "Congress knows what language to use to award attorney's fees to an attorney." *Id.* at 16a-17a. The court of appeals observed that "Congress could have worded the EAJA statute [similarly], but it did not do so." *Id.* at 17a.

b. The court of appeals held that, because the EAJA award was payable to petitioner rather than to her attorney, the award was subject to offset to collect petitioner's pre-existing debt to the United States. Pet. App. 24a-26a. The court explained that, under the Financial Management Service regulations implementing 31 U.S.C. 3716, all federal payments are subject to offset unless they are specifically exempted from the offset mechanism. Pet. App. 25a. The court observed that EAJA does not prohibit the offset of fees and expenses awarded under the statute, and that neither Section 3716 nor the regulations implementing that provision exempt EAJA awards from offset. *Ibid.*

ARGUMENT

The court of appeals correctly held that EAJA awards of fees and other expenses are properly paid to the prevailing party rather than to the attorney representing that party, and that such awards may be reduced to offset debt owed by the prevailing party to the government. Although a recent decision by the Eighth Circuit has created a division of authority on the question presented, the Acting Solicitor General has authorized en banc rehearing in the that case. In the government's view, review by this Court would be premature at the present time.

1. a. EAJA's text compels the conclusion that an award of fees and expenses under the statute is paid to the

prevailing party and not to her attorney. EAJA provides that, in circumstances where an award is appropriate and "[e]xcept as otherwise specifically provided by statute, a court shall award *to* a *prevailing party* * * * fees and other expenses * * * *incurred by that party*." 28 U.S.C. 2412(d)(1)(A) (emphases added). This Court recently explained that the same language in EAJA's provision governing administrative proceedings emphasizes party status and "leaves no doubt" that Congress intended that EAJA awards be determined from "the perspective of the litigant" and not from the perspective of her attorney. *Richlin Sec. Serv. Co.* v. *Chertoff*, 128 S. Ct. 2007, 2013 (2008). In an analysis that mirrors this Court's reasoning in *Richlin*, the court of appeals in this case concluded that equivalent language in Section 2412(d) "provides that the prevailing party, who incurred the attorney's fees, and not that party's attorney, is eligible for an award of attorney's fees." Pet. App. 12a. All but one of the courts of appeals to have addressed this question are in accord.[1]

---

[1] See, *e.g.*, *Reeves* v. *Astrue*, 526 F.3d 732, 735 (11th Cir. 2008) (EAJA's "explicit reference to the 'prevailing party' unambiguously directs the award of attorney's fees to the party who incurred those fees and not to the party's attorney."), petition for cert. pending, No. 08-5605 (filed Aug. 1, 2008); *FDL Techs., Inc.* v. *United States*, 967 F.2d 1578, 1580 (Fed. Cir. 1992) (EAJA specifies that "the prevailing party, and not its attorney, is entitled to receive the fee award."). But see *Ratliff* v. *Astrue*, No. 07-2317, 2008 WL 4093013, at *1-*2 (8th Cir. Sept. 5, 2008) (holding that "EAJA fee awards become the property of the prevailing party's attorney"); pp. 13, 14-15, *infra*. The question whether an EAJA award belongs to a Social Security claimant or his attorney is currently pending in *Stephens* v. *Astrue*, No. 08-1527 (4th Cir. filed May 7, 2008). Although the Sixth Circuit has issued an unpublished decision addressing the issue, see *King* v. *Commissioner of Soc. Sec.*, 230 Fed. Appx. 476, 481 (6th Cir. 2007) (stating that "attorney's fees awarded

Other provisions of EAJA confirm that a litigant's attorney is not the recipient of an EAJA award. For instance, an EAJA award is conditioned on the prevailing party's ability to demonstrate that her own net worth, not that of her attorney, satisfies EAJA's restrictions. See 28 U.S.C. 2412(d)(2)(B) (defining "party"). More generally, an EAJA applicant must show that "the party" rather than her attorney "is eligible *to receive* an award under [EAJA]." 28 U.S.C. 2412(d)(1)(B) (emphasis added).

As the court of appeals explained, moreover, EAJA treats attorneys in the same manner as it treats expert witnesses, engineers, scientists, analysts, and other persons found by the court to be necessary to prepare the case. See Pet. App. 14a; 28 U.S.C. 2412(d)(2)(A) ("fees and other expenses" include "the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees"). Nothing in the statute suggests that Congress intended that "all [such] persons performing services for the prevailing party in the litigation" might separately "assert their claims for compensation" against the government under EAJA. See *Panola Land Buying Ass'n* v. *Clark*, 844

---

under the EAJA are payable to the attorney; they are awarded for the benefit of the party, but the money is not the party's to keep"), that decision is not binding precedent in and will not necessarily be followed by the Sixth Circuit in light of its tension with other Sixth Circuit precedent. See *Williamson* v. *Aetna Life. Ins. Co.*, 481 F.3d 369, 376 n.4 (6th Cir.), cert. denied, 128 S. Ct. 671 (2007); cf., *e.g.*, *Drennan* v. *General Motors Corp.*, 977 F.2d 246, 254 (6th Cir. 1992) ("ERISA's fee-shifting section, like section 1988, provides that the party, not the attorney, is eligible for and receives the statutory award," which "the party [may] negotiate, waive, or settle."), cert. denied, 508 U.S. 940 (1993).

F.2d 1506, 1511 (11th Cir. 1988). Rather, those professionals—including attorneys—must obtain their compensation from the party who utilized their services. *Ibid.*; see *Oguachuba* v. *INS*, 706 F.2d 93, 97-98 (2d Cir. 1983).

Had Congress intended for EAJA awards to be payable directly to the attorneys who provided the relevant services, it presumably would have utilized language similar to that in 42 U.S.C. 406(b), which was enacted before EAJA and authorizes the Commissioner to make direct "payment to [the prevailing party's] attorney out of * * * the amount of [the] past-due benefits" awarded to that party by a court. 42 U.S.C. 406(b)(1)(A). Congress did not do so, and its decision reflects sound policy. In many EAJA contexts, a party may pay some or all of her attorney's bills during the course of litigation; an attorney may owe its client for an unrelated debt; or the party and her attorney may dispute the appropriate amount of professional fees owed under their fee agreement.[2] By making EAJA awards payable to the prevailing party, Congress avoided the need to provide for resolution of such issues under EAJA itself. Rather, disputes between EAJA award recipients and their attorneys concerning their respective obligations to each other are resolved under applicable non-EAJA law.

Finally, this Court's decisions construing 42 U.S.C. 1988 support the court of appeals' decision. The Court has explained that Section 1988, by providing that courts

---

[2] Fee relationships in Social-Security-benefit cases are different than in other EAJA contexts because of statutory provisions prohibiting attorneys from collecting or demanding from their clients anything more than the authorized allocation of past-due benefits awarded by a court. See *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 795-796 (2002) (discussing 42 U.S.C. 406(a)(5) and (b)(2)).

"may allow the prevailing party * * * a reasonable attorney's fee as part of the costs," 42 U.S.C. 1988(b), makes "the party, rather than the lawyer," eligible for fee awards. *Venegas* v. *Mitchell*, 495 U.S. 82, 87 (1990). This Court has therefore "rejected the argument that the entitlement to a § 1988 award belongs to the attorney rather than the plaintiff," *id.* at 89 (citing *Evans* v. *Jeff D.*, 475 U.S. 717, 731-732 (1986)), holding instead that a plaintiff may use a potential fee award as a "bargaining chip" that she can waive, settle, or negotiate away to obtain other benefits for herself. *Jeff D.*, 475 U.S. at 731 & n.20; see *Venegas*, 495 U.S. at 88. This Court has construed fee-shifting provisions similarly in analogous contexts, see Pet. 13a n.5 (citing cases), and it would be anomalous to do otherwise here, particularly given the additional textual indications in EAJA (see pp. 6-9, *supra*) that Congress intended EAJA fees and expenses to be paid to the prevailing party.

b. The court of appeals was also correct in holding (see Pet. App. 24a-26a) that the EAJA award in this case, like most federal payments, was subject to an administrative offset for the pre-existing debt that petitioner owed to the United States. As the court explained, "[a]ll federal payments, including 'fees,' are subject to administrative offset," except for payments that are specifically listed as exceptions to that general rule. *Id.* at 25a (citing 31 ~~C.F.R.~~ 285.5(e)(1) and (2)). Neither EAJA itself, nor the statutory and regulatory provisions governing the administrative-offset process, exempt the fee award in this case from the offset mechanism. See *ibid.* Thus, because the EAJA award was properly payable to petitioner rather than to her attorney, it was subject to offset to collect the separate debt that petitioner owed to the United States.

c. Petitioner contends (Pet. 23) that allowing offset in the circumstances presented here will impair the achievement of EAJA's purpose, as described in its legislative history, because Social Security claimants who owe pre-existing debts to the government will find it difficult to obtain legal representation. That claim lacks merit. Given EAJA's "straightforward statutory command" that courts are to award attorney's fees to the prevailing party, as well as the absence of any exception for EAJA awards to the general rules governing the Treasury Offset Program, "there is no reason to resort to legislative history." *United States* v. *Gonzales*, 520 U.S. 1, 6 (1997). In any event, the legislative history supports the plain meaning of EAJA's text. In authorizing "certain prevailing parties to recover an award of attorney fees * * * and other expenses against the United States," H.R. Rep. No. 1418, *supra*, at 5-8, Congress sought to "eliminate for the average person the financial disincentive to challenge unreasonable governmental actions," *Commissioner, INS* v. *Jean*, 496 U.S. 154, 163 (1990), not to further the financial interests of the attorney who provides the representation. See *Panola*, 844 F.2d at 1511 (explaining that "such fee provisions were [not] enacted for the benefit of the Bar"). And while petitioner suggests (Pet. 17, 23, 25) that awarding the fee to the prevailing party would diminish a plaintiff's ability to obtain counsel, the court of appeals rightly found that contention "purely speculative." Pet. App. 22a; see *Jeff D.*, 475 U.S. at 742 n.34 (noting that "the likelihood of this circumstance arising is remote" under Section 1988).

2. Petitioner contends (Pet. 9-16) that the decision in this case conflicts with decisions of numerous courts of appeals. That contention is greatly exaggerated. See

p. 7 n.1, *supra*. Most of the decisions on which petitioner relies either involve fee-shifting statutes other than EAJA that do not use EAJA's "prevailing party" formulation;[3] are limited to the specific fee provision involved;[4] are older rulings reflecting rationales subsequently undermined by *Jeff D.* and *Venegas*;[5] are unpublished and therefore without precedential value; or are otherwise distinguishable.[6]

---

[3] See, *e.g.*, *United States ex rel. Virani* v. *Jerry M. Lewis Truck Parts & Equip., Inc.*, 89 F.3d 574, 577-579 (9th Cir. 1996) (False Claims Act), cert. denied, 519 U.S. 1109 (1997); *Plant* v. *Blazer Fin. Servs., Inc.*, 598 F.2d 1357, 1365 (5th Cir. 1979) (Truth in Lending Act); *Rodriguez* v. *Taylor*, 569 F.2d 1231, 1244-1245 (3d Cir. 1977) (stating that "fee awards must accrue to counsel" under Age Discrimination in Employment Act, which requires court to "allow a reasonable attorney's fee to be paid by the defendant" when judgment is entered for the plaintiff), cert. denied, 436 U.S. 913 (1978); cf. *Jeff D.*, 475 U.S. at 730 n.19 (acknowledging that courts have treated fee awards under Truth in Lending Act differently; citing decision following *Plant*); *Gilbrook* v. *City of Westminster*, 177 F.3d 839, 872-875 (9th Cir.) (declining to extend *Virani* to fees awarded to "prevailing party" under Section 1988), cert. denied, 528 U.S. 1061 (1999).

[4] See, *e.g.*, *Willis* v. *GAO*, 448 F.3d 1341, 1347 & n.3 (Fed. Cir. 2006) (addressing fee under Civil Service Reform Act and recognizing that "the client rather than the attorney has the right to collect fees awarded under [EAJA]"), cert. denied, 127 S. Ct. 1356 (2007).

[5] See, *e.g.*, *Dennis* v. *Chang*, 611 F.2d 1302, 1309 (9th Cir. 1980) (dicta stating that Section 1988 fee "award should be made to the organization that provided [pro bono] legal services" to "avoid a windfall" to the plaintiff); *Hairston* v. *R&R Apartments*, 510 F.2d 1090, 1093 (7th Cir. 1975) (similar for Fair Housing Act fees); cf. *Jeff D.*, 475 U.S. at 721-722, 730-732 (litigant represented by pro bono counsel may waive statutory attorney fees under Section 1988 to secure more favorable settlement).

[6] See, *e.g.*, *Turner* v. *Secretary of the Air Force*, 944 F.2d 804, 808 & n.4 (11th Cir. 1991) (stating that "it is clear that the award of attorneys' fees [under Title VII] belongs to the prevailing party, not to the attor-

After the petition for a writ of certiorari was filed in this case, however, the Eighth Circuit held that "EAJA fee awards become the property of the prevailing party's attorney when assessed and may not be used to offset the plaintiff's debt." *Ratliff* v. *Astrue*, No. 07-2317, 2008 WL 4093013, at *2 (8th Cir. Sept. 5, 2008). The *Ratliff* panel acknowledged that its holding conflicted with decisions of several courts of appeals (including the decision in this case), and explained that, while it otherwise might "well agree with [its] sister circuits and be persuaded by a literal interpretation" of EAJA's text, it felt constrained by Eighth Circuit precedent to hold the challenged offset to be impermissible. *Id.* at *1-*2. Judge Gruender concurred but wrote "separately to emphasize that [the court's] holding today, as compelled by [circuit precedent], is inconsistent with language in two Supreme Court opinions, the EAJA's plain language, and the holdings of most other circuit courts." *Id.* at *3 (discussing *Jeff D.* and *Venegas*).

In addition, the Fifth Circuit has held that, although a fee award under 26 U.S.C. 7430 is made to a "prevailing party," that statutory directive "is not controlling" for purposes of administrative offsets because "the real part[ies] in interest vis-a-vis attorneys' fees awarded under the statute are the attorneys themselves," such

---

ney representing the party," while noting in dicta that fee may sometimes be "distributed directly to the attorney" where doing so is most practical); *Richardson* v. *Penfold*, 900 F.2d 116, 117 (7th Cir. 1990) (explaining that "award of attorney's fees under section 1988 is to the party, not to his lawyer," while noting in dicta that courts commonly make the "award directly to the lawyer where * * * the lawyer's contractual entitlement is uncontested"); *Cornella* v. *Schweiker*, 728 F.2d 978, 981, 986-987 (8th Cir. 1984) ("prevailing party may obtain attorneys' fees" under EAJA if represented by pro bono counsel).

that "the prevailing party is only nominally the person who receives the award." *Marré* v. *United States*, 117 F.3d 297, 304 (5th Cir. 1997). Concluding that "the fee once awarded becomes in effect an asset of the attorney," the court held that the government could not offset a federal debt owed by the prevailing party from fees awarded under Section 7430. *Id.* at 304-305 & n.11. Although *Marré* does not squarely conflict with the decision below because the two cases involved different fee-shifting statutes, Section 7430 was largely modeled on EAJA and expressly incorporates EAJA's definitions of "party" and "prevailing party." See 26 U.S.C. 7430(a); see also 26 U.S.C. 7430(c)(4) (defining the term "prevailing party" by referencing 28 U.S.C. 2412(d)(1)(B) and (2)(B)). In its administration of the Treasury Offset Program, the government has therefore treated *Marré* as precluding use of the offset mechanism against EAJA awards in cases within the Fifth Circuit.

The decisions in *Ratliff* and *Marré* create the potential for disuniformity in the application of the Treasury Offset Program to EAJA awards in Social Security cases. In the government's view, however, the question presented does not warrant review by this Court at the present time.[7] The Acting Solicitor General has authorized the filing of a petition for rehearing en banc in *Ratliff*, and the en banc Eighth Circuit of course would not be bound by the prior circuit precedents that the *Ratliff* panel and the concurring judge deemed to be controlling. If the Eighth Circuit grants rehearing en banc and approves the offset at issue in that case, its

---

[7] The petition for a writ of certiorari in *Reeves* v. *Astrue*, No. 08-5605 (filed Aug. 1, 2008), presents substantially the same question as is presented in this case. The Court may therefore wish to consider the petitions together.

decision will eliminate the current circuit conflict on the question whether EAJA awards are subject to administrative offset to collect pre-existing debts owed by prevailing parties.

Although the Fifth Circuit's decision in *Marré* is in substantial tension with the ruling below, the two decisions do not squarely conflict because the cases involved different fee-shifting statutes. And if the Eighth Circuit grants rehearing en banc in *Ratliff* and a sufficient consensus ultimately develops among the other courts of appeals, the Fifth Circuit may be willing at a later date to reconsider its decision in *Marré*. In light of those considerations, review by this Court would be premature at the present time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General
GREGORY G. KATSAS
Assistant Attorney General
WILLIAM KANTER
MICHAEL E. ROBINSON
Attorneys

SEPTEMBER 2008